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No. 86-871

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE POTOMAC ELECTRIC POWER COMPANY,
Petitioner,
v.
STEPHEN H. SACHS, ATTORNEY GENERAL OF MARYLAND, AND ADELE WILZACK, SECRETARY OF THE MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Petitioner, the Potomac Electric Power Company ("PEPCO"), submits this supplemental brief pursuant to Supreme Court Rule 22.6 to call to the attention of the Court an important factual development subsequent to the filing of the petition.[1] In light of that development, PEPCO respectfully requests that the Court grant the writ, vacate the opinion and judgment below, and remand the case to the Fourth Circuit for reconsideration.

1. The court below held that federal courts must abstain in favor of state grand jury investigations. From mid-1985 through the filing of the instant petition on December 1, 1986, PEPCO was the subject of such an investigation by a Maryland grand jury. *See* App. to

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[1] The statement required pursuant to Rule 28.1 appears in the Petition at ii n.*.

Pet. at 13a. The decision of the court below that abstention was required was based solely on the pendency of the grand jury investigation of PEPCO. *See id.* at 17a-19a.

On December 9, 1986, however—shortly after filing and service of the instant petition—the Office of the Attorney General of Maryland [2] sent counsel for petitioner a letter advising that, in light of the initiation of an investigation by federal authorities, "we have decided to suspend our own investigation involving PEPCO." The letter noted that "[a]s with all investigations by this office, the PEPCO matter is subject to re-examination should new evidence become available at a future time which would warrant re-opening of the investigation." [3]

2. The court below should be afforded an opportunity to consider the effect of this new development, including whether the abstention issue is now moot. The court may well decide that abstention is no longer appropriate, since the only pending state proceeding on which it relied—the grand jury investigation—has appparently ended.[4]

While the State's action may have mooted the question decided below and presented to this Court in the petition, the case itself is not moot. PEPCO commenced the instant case seeking a declaratory judgment that federal law preempted Maryland from extending its hazardous waste regulations to cover polychlorinated biphenyls ("PCBs"). That question was fully briefed and argued below, but was not reached by the Fourth Circuit because of its decision on abstention. *See* App. to Pet. at 14a ("Because we hold that abstention is ap-

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[2] The Attorney General is a respondent in this case. Pet. at ii.

[3] The letter is reproduced in full in the appendix hereto.

[4] Should the Fourth Circuit hold after reconsideration that abstention is still required—because the state investigation may be reopened, or for some other reason—PEPCO would certainly seek review of that decision in this Court.

propriate in this case, we do not address the merits of PEPCO's preemption claim").

A live controversy continues to exist between the parties with respect to the preemption issue. Quite apart from any threat of indictment by the grand jury, the State's effort to regulate PCBs has had a direct and immediate effect on PEPCO's ongoing operations. As explained in the petition, the State's regulatory activity has compelled PEPCO to alter its practices and has created a climate of uncertainty with respect to PEPCO facilities in Maryland. To cite one example, the state regulatory regime has forced PEPCO to adopt inefficient trucking and burning practices for oil shipped to its generating station in Maryland, since there is no storage facility at that site that complies with state as opposed to federal law. In addition, PEPCO has been compelled to restrict its use of other storage facilities in Maryland, and to alter its solicitation of bids for scrap transformers, to exclude bidders who might take the transformers into Maryland. *See* Pet. at 4-5; Ct. App. JA at 66-69, 127-129. The preemption question thus remains a live controversy ripe for judicial resolution. *See, e.g., Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 (1983); *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498 (1972).

3. When an entire case has become moot, this Court as a matter of course will vacate the judgment and remand the case with directions to dismiss.[5] When only the

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[5] As the Court noted in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." As is clear from this quotation, the Court generally follows this practice with respect to cases at the certiorari stage as well as with respect to cases in which certiorari has previously been granted. *See, e.g., SEC* v. *Board of Trade*, 459 U.S. 1026 (1982); *State Fair of Texas* v. *Consumer Product Safety Comm'n*, 454 U.S. 1026 (1981). The reason for

issues presented to this Court have become moot, but the entire case has not, the case is remanded not with directions to dismiss but rather for whatever further proceedings may be appropriate. *See, e.g., University of Texas* v. *Camenisch*, 451 U.S. 390 (1981). In *United States Department of Justice* v. *Provenzano*, 469 U.S. 14 (1984), for example, the issue presented to the Court became moot due to a change in the law. The Court noted that "[t]he mootness of the particular issue that was presented to us, however, does not mean that the cases themselves do not remain alive." *Id.* at 15. The Court accordingly vacated the judgments below and remanded "for such further proceedings as are indicated." *Id.* at 15-16. *See also Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 415 (1972); *Bryan* v. *Austin*, 354 U.S. 933 (1957).

As with the application of *Munsingwear* to cases that are entirely moot, the Court follows this procedure for cases that are partially moot both with respect to cases at the jurisdictional stage and those awaiting decision on the merits. Indeed, in *Crowell* v. *Mader*, 444 U.S. 806 (1979), the Court, considering an appeal at the jurisdictional stage, vacated the case and remanded it with directions to dismiss as moot. On rehearing, the Court stated that such an order "is appropriate when an entire case has become moot but * * * is inappropriate when only the issues raised on appeal have been resolved." 444 U.S. 505, 506 (1980). Since the entire case had not in fact become moot, the Court vacated its prior order and instead "direct[ed] that the judgment * * * be vacated without prejudice to such further proceedings * * * as may be appropriate." *Id.* at 506.

More recently, in *Honig* v. *Students of the California School for the Blind*, 471 U.S. 148 (1985), the Court was

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this practice is clear: "the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *United States* v. *Munsingwear, Inc.*, 340 U.S. at 40.

confronted with a petition for certiorari in which "the only question of law actually ruled on by the Court of Appeals" had become moot, although other issues "still remain[ed] to be resolved" in the case. *Id.* at 149. The Court granted the petition for certiorari, vacated the judgment, and remanded for further proceedings. *Id.* at 150. The present case is in the same posture as *Honig*, and the same procedure should be followed.

The opinion and judgment below cannot stand. The court below held that "PEPCO's action must be dismissed and its claims pursued in Maryland courts." App. to Pet. at 19a. To the extent the question presented in PEPCO's petition has been rendered moot, PEPCO has been precluded from obtaining full review of the judgment, and it should therefore be vacated. Since the case as a whole is *not* moot, however, the case should be remanded not with instructions to dismiss but "for such further proceedings as are indicated." *United States Department of Justice* v. *Provenzano*, 469 U.S. at 16.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
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APPENDIX

OFFICES OF

[SEAL]

THE ATTORNEY GENERAL

December 9, 1986

Arnold M. Weiner, Esquire
Melnicove, Kaufman, Weiner & Smouse, P.A.
36 South Charles Street, 6th Floor
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Re: Potomac Electric Power Company

Dear Mr. Weiner:

A matter involving the Potomac Electric Power Company (PEPCO) has been investigated by this office since mid-1985. As you know, the same matter is presently being investigated by federal authorities. Given the extent of the federal interest, we have decided to suspend our own investigation involving PEPCO. As with all investigations by this office, the PEPCO matter is subject to re-examination should new evidence become available at a future time which would warrant re-opening of the investigation.

Sincerely,

/s/ James Lyko
JAMES LYKO
Assistant Attorney General

JL:jr